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## Injunctive Russian Roulette and Employment Noncompetition Cases: *A.E.P. Industries, Inc. v. McClure*

An employment contract containing a covenant not to compete raises difficult issues when the employer seeks a preliminary injunction<sup>1</sup> against his former employee for breach of the covenant. The issues are difficult because two significant rights are in conflict: the right of the employer to enforce a contract term designed to protect him from unfair competition<sup>2</sup> and the right of the employee to pursue his livelihood without unfair restraint.<sup>3</sup> North Carolina courts traditionally have employed a two-part test for granting preliminary injunctions in all types of cases.<sup>4</sup> To satisfy the first prong of the test, a plaintiff was required to demonstrate a reasonable likelihood that he would prevail on the merits.<sup>5</sup> To satisfy the second prong, a plaintiff was required to

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1. N.C. GEN. STAT. § 1-485 (1983) authorizes the issuance of preliminary injunctions:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiffs; or

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual;

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2. See *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944); *Beam v. Rutledge*, 217 N.C. 670, 672-73, 9 S.E.2d 476, 477 (1940).

3. *Kadis v. Britt*, 224 N.C. 154, 160, 29 S.E.2d 543, 546 (1944); *Beam v. Rutledge*, 217 N.C. 670, 673, 9 S.E.2d 476, 477 (1940). See *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 75, 185 S.E.2d 278, 280-81 (1971), cert. denied, 280 N.C. 305, 186 S.E.2d 178 (1972).

4. For examples of application of the traditional test in trespass cases, see *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977) (injunction sought to prevent defendant from creating cloud on title to land); *Fruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975) (motion to enjoin defendant from obstructing roadway); *Huskins v. Yancey Hosp.*, 238 N.C. 357, 78 S.E.2d 116 (1953) (injunction sought to stop defendant from using driveway that infringed on plaintiff's property); *Frink v. Stewart*, 94 N.C. 484 (1886) (injunction sought to stop defendant from trespassing). The traditional rule also has been applied to contract cases. See, e.g., *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 214 S.E.2d 49 (1975) (motion to protect exclusive rights to telephone book advertising covers); *Public Serv. Co. v. City of Shelby*, 252 N.C. 816, 115 S.E.2d 12 (1960) (motion to enjoin city's violation of utility's franchise agreement); *Boone v. Boone*, 217 N.C. 722, 9 S.E.2d 383 (1940) (injunction sought to enforce contract stipulating that defendant-husband would not file alienation of affection suit against plaintiff's boyfriend). Intra-denominational conflicts also have been the subjects of the traditional rule. See *Board of Provincial Elders of the S. Province of the Moravian Church v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968) (injunction sought to stop splinter sect from using "Moravian" in church name); *Western Conference of Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962) (injunction sought to stop defendant from holding himself out as minister of conference).

For examples of employment noncompetition cases and the traditional rule, see *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 173 S.E.2d 316 (1970); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930).

5. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). The first step is a showing that the covenant, on its face, is not illegal. Such an evaluation involves applying whatever standard the state courts have adopted; generally the court examines the covenant to determine whether it is unreasonable in length, time, or territory; whether it is part of a valid contract and supported by valid consideration; and whether the covenant is void as against public policy. See, e.g., *U-Haul Co. v. Jones*, 269 N.C. 284, 286, 152 S.E.2d 65, 67 (1967). For an

establish either that he would suffer irreparable harm if the preliminary injunction did not issue, or that the injunction was necessary to protect his rights during the course of litigation.<sup>6</sup> In *A.E.P. Industries, Inc. v. McClure*,<sup>7</sup> however, the North Carolina Supreme Court held that a preliminary injunction should issue "almost as a matter of course"<sup>8</sup> after an employee breaches a covenant not to compete. Thus, the *McClure* court virtually eliminated the second prong of the traditional preliminary injunction test for employment noncompetition cases, holding that when an employee breaches a covenant not to compete, the employer's "'damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate.'"<sup>9</sup>

Although a preliminary injunction is interlocutory and, therefore, not intended to be a determination on the merits,<sup>10</sup> in employment noncompetition cases the grant or denial of a preliminary injunction usually has the same effect as a final determination on the merits.<sup>11</sup> This is because the typically brief noncompetition period<sup>12</sup> lapses in most contracts before the case either comes to trial or works its way through the appellate process.<sup>13</sup> The result is injunctive Russian Roulette in which each side gets one early shot and the winner takes all. This Note examines the issues presented in *McClure* and proposes judicial and legislative modifications that would improve the quality and efficiency of the courts' decisions in employment noncompetition suits seeking injunctive relief.

R. Bruce McClure sold polyethylene products for a variety of companies from 1965 until 1976,<sup>14</sup> when A.E.P. Industries hired him as a salesman.<sup>15</sup> Eight months later he was promoted to sales manager.<sup>16</sup> McClure testified that fourteen to fifteen months after he was hired he signed an undated em-

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analysis of the standards for enforceability of employment noncompetition covenants in North Carolina, see Constangy, *Employment Contract Covenants not to Compete: Enforceability Under North Carolina Law*, 10 WAKE FOREST L. REV. 217 (1974).

6. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

7. 308 N.C. 393, 302 S.E.2d 754 (1983).

8. *Id.* at 406, 302 S.E.2d at 762.

9. *Id.* (quoting 43A C.J.S. *Injunctions* § 95 (1978)).

10. See, e.g., Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

11. See *McClure*, 308 N.C. at 405, 302 S.E.2d at 762; see, e.g., Cobb v. Clegg, 137 N.C. 153, 159, 49 S.E. 80, 83 (1904) (If principal relief sought is injunctive, failure to grant preliminary injunction eliminates that remedy.).

12. See *U-Haul Co. v. Jones*, 269 N.C. 284, 286, 152 S.E.2d 65, 67 (1967); *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 181, 128 S.E.2d 139, 141 (1962); *Asheville Assocs., Inc. v. Miller*, 255 N.C. 400, 402, 121 S.E.2d 593, 594 (1961). Despite the regularity with which the courts state that a short or reasonable duration is a necessity to create a valid and binding covenant, one commentator has noted that the North Carolina courts have not demanded brevity in enforcing such covenants. Note, *Covenants Not to Compete*, 38 N.C.L. REV. 395, 396 (1960) ("The fact is that in no [North Carolina] decision has a covenant been found to be unreasonable because of too extensive a duration."); see, e.g., *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 249, 120 S.E.2d 739, 742 (1961) (upholding five-year restrictive covenant).

13. See *McClure*, 308 N.C. at 401, 302 S.E.2d at 759 ("[w]here time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute.").

14. Record at 32-33, *McClure*.

15. *Id.* at 33.

16. *Id.* at 35.

ployment contract<sup>17</sup> containing a covenant not to compete.<sup>18</sup> A.E.P., on the other hand, maintained that McClure signed the agreement as an original condition of employment.<sup>19</sup> McClure also signed a termination agreement when he was fired<sup>20</sup> after almost five years employment with A.E.P.<sup>21</sup> The termination agreement stipulated that McClure would not "use or disclose any proprietary information of A.E.P. which has been acquired by him directly and solely as a result of his previous employment by A.E.P." and that McClure would take a job with an A.E.P. affiliate, Design Poly Bag, Inc.<sup>22</sup>

After one month with Design Poly Bag, McClure resigned because of disagreements concerning his compensation.<sup>23</sup> He immediately established his

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17. *Id.* at 36. McClure's affidavit stated that he signed this agreement under threat of dismissal and that he received no consideration for signing it. *Id.*

18. *Id.* at 7-9, 36. The covenant stated that McClure signed the agreement in consideration for continued employment, a salesman's bonus, and further skill development. The covenant further stated that:

[T]he names of A.E.P. Industries, Inc.'s customers and prospects are not generally known in the trade. As a consequence of the confidential nature of the customer and prospect lists, and other product, prices, sales and financial information which has been and will be made available to me in my employment by your firm, I will not, during the term of my employment and for a period of 18 months thereafter (regardless of the reason for the termination of my employment) . . .

*McClure*, 308 N.C. at 395, 302 S.E.2d at 756. This recitation was followed by a series of proscribed activities that effectively prohibited McClure from soliciting any of A.E.P.'s customers or divulging any information about the customers to any other individual or company. The agreement continued: "I acknowledge that the remedies at law for the breach of any restrictive covenants contained in the immediately preceding paragraph shall be deemed to be inadequate and that A.E.P. Industries, Inc. shall be entitled to injunctive relief for any such breach." *Id.* at 396, 302 S.E.2d at 756-57.

19. Record at 2; *infra* note 107 and accompanying text. The supreme court made no mention of this controversy, accepting without comment that the agreement was signed as an original term of employment. *McClure*, 308 N.C. at 394, 302 S.E.2d at 756. This split with the trial court illuminates the rule that an appellate court is not bound by the findings of the trial court on an appeal from an order granting or denying a preliminary injunction. The appellate court may review the evidence and find facts for itself; such facts are not binding at any subsequent trial on the merits. See *id.* at 402, 302 S.E.2d at 760; *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975). McClure subsequently signed a second agreement substantially similar to the first agreement of August 23, 1979. *McClure*, 308 N.C. at 396, 302 S.E.2d at 757. McClure testified that he had signed the second contract under threat of dismissal, Record at 38, and the trial court agreed with him. *Id.* at 52.

20. *McClure*, 308 N.C. at 396-98, 302 S.E.2d at 757-58. The Agreement of Termination provided that McClure had been employed by A.E.P., but was leaving to go to work for Design Poly Bag. The agreement further stipulated that he gained "confidential and proprietary" information while employed by A.E.P. and that as a result "Employee, Bruce McClure, agrees that he will not at any time hereafter use or disclose any proprietary information of A.E.P. which has been acquired by him directly and solely as a result of his previous employment by A.E.P." The agreement also stated that customer lists were proprietary and confidential information and included a nonexclusive sample list of customers. The covenant's restrictive period was 18 months and its geographic scope precluded competition within 300 miles of any A.E.P. office. *Id.*

21. Record at 39. At the firing, McClure and Brendan Barba, president of A.E.P. Industries, discussed McClure's financially distraught position, and Barba indicated McClure could work for Design Poly Bag with substantially fewer perquisites. According to his affidavit, McClure eventually accepted this offer because of his financial difficulties. *Id.* at 39-40. The day after his firing McClure cleaned out his A.E.P. office under direct supervision designed to prevent the removal of anything other than personal effects. *Id.* at 40.

22. *Id.* at 397, 302 S.E.2d at 757.

23. *Id.* at 399, 302 S.E.2d at 758. In large part the disagreement involved McClure's allegation that he was promised six-months' severance pay from A.E.P. in addition to his salary with Design Poly Bag. Record at 41-43. A.E.P., however, introduced into evidence an unsigned

own polyethylene products business,<sup>24</sup> calling on many of the same customers he had contacted while employed by A.E.P.<sup>25</sup> A.E.P. filed suit for breach of the noncompetition covenant<sup>26</sup> and obtained a temporary restraining order.<sup>27</sup> Thereafter, the trial court denied A.E.P.'s motion for a preliminary injunction and dissolved the temporary restraining order.<sup>28</sup> The court of appeals affirmed.<sup>29</sup>

The North Carolina Supreme Court agreed that A.E.P. had satisfied the first prong of the traditional test<sup>30</sup> by establishing a reasonable likelihood that it would prevail on the merits.<sup>31</sup> It held, however, that the lower court had erred in relying exclusively on A.E.P.'s failure to prove that irreparable harm would result should the preliminary injunction not issue.<sup>32</sup> According to the court, "whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation [is a] more important [issue] in cases such as the one now under consideration."<sup>33</sup> The court therefore concluded that the issuance of a preliminary injunction was necessary to protect

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"memo of compensation," to which it claimed McClure had acquiesced, that made no mention of severance pay. *McClure*, 308 N.C. at 398-99, 302 S.E.2d at 758.

24. *McClure*, 308 N.C. at 398-99, 302 S.E.2d at 758. McClure proceeded to lease an office, buy office equipment, and hire salesmen and a secretary at a fairly large expense. Record at 46.

25. *McClure*, 308 N.C. at 399, 302 S.E.2d at 758.

26. *Id.* The suit filed by A.E.P. requested damages "believed to be in excess of One Million Dollars (\$1,000,000)," in addition to injunctive relief. Record at 6-7.

27. *McClure*, 308 N.C. at 399, 302 S.E.2d at 758.

28. *Id.* at 400, 302 S.E.2d at 759. The trial court decided that A.E.P. failed to prove it would suffer irreparable injury should the preliminary injunction not issue. Therefore, in weighing the conveniences and inconveniences to both parties, the trial court held that the inconvenience and damage to McClure in restricting his livelihood would be real and immediate should the preliminary injunction issue. A.E.P., however, had failed to prove that it would suffer any substantial financial damage. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 158, 293 S.E.2d 232, 234 (1982), *rev'd*, 308 N.C. 393, 302 S.E.2d 754 (1983). Thus, the temporary restraining order had to be dissolved.

29. *McClure*, 58 N.C. App. at 159, 293 S.E.2d at 234.

30. See *supra* note 5 and accompanying text. The court faced a fairly unusual situation in that before it evaluated the injunctive request it held that New Jersey law controlled whether the covenant was valid. *McClure*, 308 N.C. at 402, 302 S.E.2d at 760. The New Jersey rule for such determinations is "(1) whether the covenant is reasonable as to time and territory . . . (2) whether it is made a part of a contract of employment and based on reasonable consideration . . . (3) whether the covenant is against public policy or unreasonable . . . [and] (4) whether the employee has, in fact, violated the terms of the covenant . . ." *Id.* at 403-04, 302 S.E.2d at 761. The court held that the New Jersey test was substantially the same as the North Carolina test, i.e., that the covenant is: "(1) In writing. (2) Made part of a contract of employment. (3) Based on reasonable consideration. (4) Reasonable both as to time and territory. (5) Not against public policy." *Id.* at 402-03, 302 S.E.2d at 760.

The court's opinion on this conflict of law question is not clear. It is at least arguable that the court's holding was that since the two laws were so similar it would use North Carolina law. In a similar fact situation, however, the court of appeals used California's substantive test to determine the validity of a covenant not to compete while applying North Carolina procedural law to decide whether a preliminary injunction should issue. See *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 690, 228 S.E.2d 478, 482-83 (1976); see, e.g., *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 331, 178 S.E.2d 781, 786 (1971) (applying Georgia substantive law).

31. *McClure*, 308 N.C. at 404, 302 S.E.2d at 761.

32. See *id.* at 405, 302 S.E.2d at 761-62 ("[T]he trial court's second inquiry is not limited to the question of irreparable injury.").

33. *Id.* at 406, 302 S.E.2d at 762. The court never specified exactly what "such cases" were. Implicitly, the court meant cases in which an employer seeks a preliminary injunction to enforce a covenant not to compete against a former employee.

A.E.P.'s rights.<sup>34</sup>

The supreme court noted that two important aspects of *McClure* distinguished it from the usual case in which a preliminary injunction was sought; these two aspects demanded a shift in emphasis from a showing of irreparable harm<sup>35</sup> to protection of the employer's right to injunctive relief.<sup>36</sup> First, the ultimate relief sought by plaintiff was injunctive enforcement of the covenant.<sup>37</sup> Second, the decision on whether the preliminary injunction should issue became, "in effect, a determination on the merits"<sup>38</sup> largely because of the covenant's brevity.<sup>39</sup>

Because of these factors, unique to employment noncompetition cases, the court accepted A.E.P.'s "persuasive"<sup>40</sup> argument that,

"[in a] noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary to show actual damages by instances of successful competition, but it is sufficient if such competition, in violation of the covenant, may result in injury."<sup>41</sup>

Consequently, the court adopted a four-part standard for employment noncompetition cases, holding that:

[1] where the primary ultimate remedy sought is an injunction; [2] where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; [3] where no 'legal' (as opposed to equitable) remedy will suffice; and [4] where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.<sup>42</sup>

Justice Martin, joined by Justices Copeland and Exum,<sup>43</sup> issued a blistering dissent that criticized the majority decision on three grounds. First, the dissent noted that the questions on appeal were moot because the restrictive

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34. *Id.* at 410, 302 S.E.2d at 764.

35. *Id.* at 406, 302 S.E.2d at 762. ("We recognize that injunctive relief is equitable in nature and that some courts, in weighing the equities, have determined that because plaintiff can obtain full and complete justice by a judgement for money damages, and because hardship to the defendant outweighs any hardship to the plaintiff, plaintiff has not met his burden of showing that it has or is likely to sustain irreparable injury.").

36. *Id.*

37. *Id.* The court declined to comment on the dissent's argument that A.E.P.'s primary relief could not be characterized as injunctive when it also sought monetary damages in excess of one million dollars. See *id.* at 417, 302 S.E.2d at 768 (Martin, J., dissenting).

38. *Id.* at 405, 302 S.E.2d at 762. Additionally, the court noted that the considerations that the trial court must weigh in granting or denying the motion for a preliminary injunction are the same as the considerations involved in a determination on the merits. This problem inheres in such employment cases and is a prime reason for reform of the judicial procedure in this area. See *supra* notes 10-13 and accompanying text.

39. *McClure*, 308 N.C. at 405, 302 S.E.2d at 762.

40. *Id.* at 406, 302 S.E.2d at 762.

41. *Id.* (quoting 43A C.J.S. *Injunctions* § 95 (1978)).

42. *Id.* at 410, 302 S.E.2d at 764.

43. *Id.* at 411, 302 S.E.2d at 765 (Martin, J., dissenting).

period had lapsed and the appeal therefore should have been dismissed.<sup>44</sup> Second, the dissent argued that *McClure* was decided improperly because plaintiff did not carry its burden of proving irreparable harm or, indeed, any harm at all.<sup>45</sup> Third, the dissent concluded that the majority erred by not properly balancing the equities in the case.<sup>46</sup> The dissent stated that, had the majority done so, it would have been obvious that the potential harm to McClure far outweighed the need to protect A.E.P.'s rights during the course of litigation.<sup>47</sup>

To understand the import of the court's holding in *McClure*, the judiciary's struggle to develop a standard for enjoining violators of covenants not to compete must be examined. This struggle has been characterized by the development of two general analyses,<sup>48</sup> each embraced by the courts with varying degrees of enthusiasm, clarity, and consistency: the "special knowledge" test, which stresses protection of the unique or special assets of the employer's business as communicated to the employee;<sup>49</sup> and the "balancing of conveniences and inconveniences" test, which stresses protection of the employer from irreparable harm.<sup>50</sup> The *McClure* court, however, created a third analy-

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44. *Id.* at 411-12, 302 S.E.2d at 765 (Martin, J., dissenting).

45. *Id.* at 416, 302 S.E.2d at 768 (Martin, J., dissenting). The dissent raised four points which demonstrated that A.E.P. had not proven irreparable injury. First, the open nature of the polyethylene products market, as testified to by six sales and managerial employees associated with the market, indicated that it was not subject to confidential information and the use or misuse thereof. *Id.* at 415, 302 S.E.2d at 767 (Martin, J., dissenting). Second, A.E.P. did not demonstrate that McClure's competition actually had diverted orders from A.E.P. *Id.* at 416, 302 S.E.2d at 768 (Martin, J., dissenting). Third, A.E.P. did not carry its burden of persuasion that the damages it suffered could not be compensated by money damages. *Id.* Fourth, denial of the preliminary injunction would not deny adequate relief to A.E.P. because its complaint sought over \$1,000,000 in money damages, clearly an adequate remedy at law. *Id.* at 417, 302 S.E.2d at 768 (Martin, J., dissenting).

46. *Id.* at 418-19, 302 S.E.2d at 769 (Martin, J., dissenting). The dissent argued that the majority had ignored the potentially devastating harm that McClure would have suffered if the preliminary injunction had been granted. The majority should have considered the restraint on McClure's livelihood, and that the preliminary injunction would decide the case against him without an opportunity to be heard. *Id.* Further, the dissent noted that the trial judge is in the best position to make this determination, and his decision should be overturned only on a showing of abuse of discretion. *Id.* at 419, 302 S.E.2d at 769 (Martin, J., dissenting).

47. *Id.* at 419, 302 S.E.2d at 769 (Martin, J., dissenting).

48. The categories selected are self defined. At no time have any of the "tests" been identified as per se rules under these designations.

49. See, e.g., *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 480, 173 S.E.2d 316, 320 (1970) (employee free to use knowledge not gained in course of employment); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 249, 120 S.E.2d 739, 743 (1961) (covenant should be enforced only if character of business and nature of employment so required); *Kadis v. Britt*, 224 N.C. 154, 162, 29 S.E.2d 543, 548 (1944) (employee can use general knowledge if not acquired in violation of confidence); *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 545, 155 S.E. 154, 157 (1930) (store manager enjoined because he "acquired an intimate knowledge of his employer's business"); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 79, 185 S.E.2d 278, 283 (1971) (employees obtained no trade secrets that needed protection), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972).

50. See *Fruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975); *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975); *Setzer v. Annas*, 286 N.C. 534, 540, 212 S.E.2d 154, 158 (1975); *Board of Provincial Elders of the S. Province of the Moravian Church v. Jones*, 273 N.C. 174, 182, 159 S.E.2d 545, 551-52 (1968); *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 626 (1962); *Public Serv. Co. v. City of Shelby*, 252 N.C. 816, 821, 115 S.E.2d 12, 16 (1960); *Huskins v. Yancey Hosp.*, 238 N.C. 357, 361, 78 S.E.2d 116, 120 (1953).

sis—the “presumption of employer rights protection” test.

The special-knowledge test emphasizes the need to evaluate the nature of the information or skills that the employee acquired while working for the employer against whom he later competed.<sup>51</sup> Through that inquiry the court seeks to protect the employer's right to safeguard his competitive advantage.<sup>52</sup> Thus, if the employee gained no special knowledge, training, trade secrets, confidential customer lists, or other confidential information, the court should refuse to issue a preliminary injunction.<sup>53</sup>

The judiciary's reluctance to enjoin the employee's violation of the covenant in the absence of special knowledge is based largely on its traditional abhorrence of restraints on trade.<sup>54</sup> Contracts restraining trade are said to encourage monopoly<sup>55</sup> and unemployment.<sup>56</sup> Although the trend is to enforce certain trade restrictions,<sup>57</sup> judges “can only go so far without coming into opposition to the public welfare.”<sup>58</sup> Courts readily enforce restrictive covenants when the sale of a business includes a covenant not to compete because the sale of goodwill is involved.<sup>59</sup> Goodwill, however, is not an element of an employment noncompetition covenant; therefore, “the courts have generally displayed a much stricter attitude [toward] covenants of this type.”<sup>60</sup> The application of restrictions on competition in contracts of ordinary employment thus raises serious questions.<sup>61</sup>

In *Scott v. Gillis*,<sup>62</sup> the first employment noncompetition covenant case in North Carolina,<sup>63</sup> although the supreme court issued a preliminary injunction it recognized implicitly that only the unique qualities of the employer's busi-

51. See *supra* note 49.

52. See *Delmar Studios, Inc. v. Goldston*, 249 N.C. 117, 119, 107 S.E.2d 277, 279 (1958); *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 79, 185 S.E.2d 278, 283 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972); see, e.g., *Constangy*, *supra* note 5, at 226-29.

53. See, e.g., *Welcome Wagon Int'l, Inc. v. Morris*, 224 F.2d 693, 698 (4th Cir. 1955); *Henley Paper Co. v. McAllister*, 253 N.C. 529, 531, 117 S.E.2d 431, 432 (1960); *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 688, 220 S.E.2d 190, 197 (1975).

54. See *Kadis v. Britt*, 224 N.C. 154, 158-60, 29 S.E.2d 543, 546 (1944); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 74, 185 S.E.2d 278, 280-281 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972).

55. *Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944).

56. *Id.* at 160, 29 S.E.2d at 546 (“Restraint of employment tends not only to deprive the public of efficient service, but to impoverish the individual and make him a public charge at the expense of the taxpayer.”). The General Assembly has acknowledged the broad public policy opposing restraints of trade and has declared such restraints illegal. N.C. GEN. STAT. §§ 75-1, -1.1, -2 (1982 & Cum. Supp. 1983).

57. *Kadis v. Britt*, 224 N.C. 154, 158-59, 29 S.E.2d 543, 546 (1944). See, e.g., *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 544, 155 S.E. 154, 157 (1930).

58. *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944).

59. *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 74-75, 185 S.E.2d 278, 280 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972).

60. *Id.* at 75, 185 S.E.2d at 281 (quoting *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247 (1963)).

61. See *Kadis v. Britt*, 224 N.C. 154, 160, 29 S.E.2d 543, 547 (1944).

62. 197 N.C. 223, 148 S.E. 315 (1929).

63. *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 545, 155 S.E. 154, 157 (1930).



ness needed protection.<sup>64</sup> The *Scott* court held that a preliminary injunction should issue against a former employee because "[s]uch [noncompetition] agreements enable an employer to instruct his assistant without fear of afterwards having a rival."<sup>65</sup> Although the *Scott* court did not limit its holding to circumstances in which the employee had acquired "special knowledge," the supreme court subsequently recognized that an inquiry into the qualitative nature of the knowledge gained by the employee was necessary before a preliminary injunction should issue to protect the employer.<sup>66</sup>

The case of *Kadis v. Britt*<sup>67</sup> marked the first time that the North Carolina Supreme Court applied the special-knowledge test to deny a preliminary injunction.<sup>68</sup> The court noted that using knowledge attained in one's employment is not unlawful when it involves no breach of confidence,<sup>69</sup> and held that it would not enforce the restrictive covenant unless "the employer has a substantial right—unique in his business which it is the office of the court to protect."<sup>70</sup> *Britt*'s emphasis on the uniqueness of the employer's business was approved in a case involving two employees who sold janitorial and automotive chemicals and supplies.<sup>71</sup> In *Wilmar, Inc. v. Liles* the court held that the employees had gained no trade secrets and refused to enjoin their competitive enterprise.<sup>72</sup>

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64. *Scott*, 197 N.C. at 227, 148 S.E. at 317. The court stressed that the preliminary injunction was necessary to "protect an established business from such [competitive] acts by one who has become familiar therewith," because the employer had imparted his "knowledge and skill" to the employee who then used it against his former employer. *Id.*

65. *Id.* at 227, 148 S.E. at 317. The employee in *Scott* was a certified public accountant. The court noted in dictum that a different standard exists, or should exist, for a professional who signs a covenant not to compete:

Few professional men would take assistants and intrust [sic] them with their business, impart to them their knowledge and skill, bring them in contact with their clients and patients, unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used . . . to appropriate the very business such associates were employed to maintain and enlarge.

*Id.* See, e.g., *Sonotone Co. v. Baldwin*, 227 N.C. 387, 42 S.E.2d 352 (1947); *Beam v. Rutledge*, 217 N.C. 670, 9 S.E.2d 473 (1939).

66. See *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930). In *Moskin Bros.*, the employee, a store manager, was preliminarily enjoined from competing with his former employer because the employee had "acquired an intimate knowledge of his employer's business, and had a personal association with his customers, which . . . would enable the employee . . . to injure the business of the [employer]." *Id.* at 545, 155 S.E. at 157. See also *Orkin Exterminating Co. v. Wilson*, 227 N.C. 96, 40 S.E.2d 696 (1946).

67. 224 N.C. 154, 29 S.E.2d 543 (1944).

68. See, e.g., *id.* at 160-61, 29 S.E.2d at 547. The employee, a deliveryman and bill collector, not only was restricted from working for two years in Wayne County by the covenant, but his wife and immediate family also were restricted. *Id.* at 157, 29 S.E.2d at 545. The court refused to impose the hardship of making a man choose between abandoning his occupation and moving his family. *Id.* at 164, 29 S.E.2d at 549.

69. *Id.* at 162, 29 S.E.2d at 547-48.

70. *Id.* at 159, 29 S.E.2d at 546. See, e.g., *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 480-81, 173 S.E.2d 316, 320 (1970).

71. *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 185 S.E. 278 (1971), cert. denied, 280 N.C. 305, 186 S.E.2d 178 (1972).

72. *Id.* at 79, 185 S.E.2d at 283 ("To be enforceable a covenant not to compete must protect some substantial interest of the employer. We are not convinced from the evidence of this case that defendants had access to any trade secrets."). Similarly, the court of appeals stressed in a later case that both defendants had gained special knowledge of the brick industry from their

The best explanation of the special knowledge rule was promulgated by the Nebraska Supreme Court in *Diamond Match Division of Diamond International Corp. v. Bernstein*,<sup>73</sup> which involved facts similar to those in *McClure*.<sup>74</sup> The *Diamond Match* court held that enforcement of a covenant not to compete would be unfair to the employee, Bernstein, and would do nothing to protect the employer's right to be free from unfair and improper competition<sup>75</sup> when the five following requirements are satisfied: (1) the business is a highly competitive one in which salesmen from competing companies call on and sell to a well-known group of customers; (2) no secret customer lists are involved; (3) no trade secrets are involved; (4) prices are known to all; and (5) the employee received no special training from the employer.<sup>76</sup> The court reasoned that if the competitor had not employed Bernstein, it would have employed some other salesman who would have had equal access to the common information.<sup>77</sup>

The special-knowledge rule ensures that an employment covenant not to compete is upheld only to protect the employer from *unfair* competition—competition resulting from knowledge or skill gained at the employer's expense.<sup>78</sup> In *McClure*, however, the North Carolina Supreme Court did not discuss or apply the special-knowledge rule.<sup>79</sup> The court declined to apply the

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former employer that they could not have obtained elsewhere. Therefore, a preliminary injunction was warranted. See *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 688, 220 S.E.2d 190, 197 (1975).

73. 196 Neb. 452, 243 N.W.2d 764 (1976).

74. Defendant in *Diamond Match* was a salesman who was employed by plaintiff for six and one-half years in a highly competitive field. Plaintiff corporation had no exclusive sales contracts and the amount of business generated depended on the industriousness of each salesman. All of plaintiff's customers were well known by people in the industry. *Id.* at 453-54, 243 N.W.2d at 765-66. As in *McClure*, plaintiff argued that the substantive law of another state, New York, applied. The court held, as in *McClure*, that the forum state's law and the outsider state's law were substantially the same and would yield the same result. *Id.* at 454-55, 243 N.W.2d at 766.

75. *Id.* at 456, 243 N.W.2d at 767.

76. *Id.* at 456, 243 N.W.2d at 766-67. McClure submitted affidavits of purchasing agents, sales managers, and one company president, all of whom were employed in the polyethylene products industry. All affidavits stated that sales in the polyethylene industry were competitive and characterized by salesmen calling on the various companies, all of which were well known within the industry. Record at 25-30. McClure's affidavit stated that he gained no trade secrets, secret customer lists, special training, or confidential information either while he was a salesman for A.E.P. or after he was promoted to sales manager. *Id.* at 36-38. He stated that while he was employed by A.E.P. he merely continued to use the techniques and contacts he had developed in his 11 years as a salesman in the polyethylene industry prior to joining A.E.P. *Id.* at 34.

77. Record at 34.

78. See *supra* notes 62-77 and accompanying text; see, e.g., 43A C.J.S. *Injunctions* § 95 (1978).

79. The court, however, did mention the conceptual basis of the special-knowledge test. *McClure*, 308 N.C. at 408, 302 S.E.2d at 763. The court quoted *Asheville Assocs. Inc. v. Miller*, 255 N.C. 400, 403-04, 121 S.E.2d 593, 595 (1961) (quoting *Annot.*, 9 A.L.R. 1456, 1463 (1920)):

"It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach."

See *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 480, 173 S.E.2d 316, 320 (1970). It is worth noting

special knowledge test apparently because the facts in *McClure* were in sharp controversy and the court wanted to institute a rule that was not fact-sensitive—a rule that would avoid the necessity of addressing the same issues at the preliminary injunction hearing as would be decided later in a decision on the merits.<sup>80</sup>

The second theory courts have applied in employment noncompetition cases involves a balancing of the conveniences and inconveniences that each party would incur<sup>81</sup> if the preliminary injunction were granted or denied.<sup>82</sup> Because this balancing approach emphasizes protection of the plaintiff only from *irreparable* injury, courts using this analysis often couch their decisions in terms of whether the plaintiff would be left without an adequate remedy at law if the preliminary injunction did not issue.<sup>83</sup> The balancing test requires that the injunction issue only if the plaintiff adequately alleges that the injunction is necessary to avoid irreparable injury.<sup>84</sup> To grant the injunction without requiring the plaintiff to show irreparable injury “would work greater injury to the defendant than is reasonably necessary for the protection of the plaintiff.”<sup>85</sup>

Defining irreparable injury as it relates to issuance of a preliminary injunction thus is crucial to this second approach. Courts have recognized two factors that imply whether the potential harm is irreparable—whether the primary relief sought is a permanent injunction and whether monetary damages would adequately remedy the plaintiff's alleged loss.<sup>86</sup> When the principal relief sought is a permanent injunction, North Carolina law provides that a preliminary injunction should issue “because a dissolution of a pending interlocutory injunction, or the refusal of one . . . will virtually decide the case upon the merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case.”<sup>87</sup> Thus, loss of the employer's sole remedy is *per se* irreparable loss.<sup>88</sup> When multiple remedies are sought, however, application of this factor may force the trial judge to justify his holding by engaging in an extended, awkward analysis to determine which remedy is the primary relief sought.<sup>89</sup>

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that the critical elements of the special knowledge rule are reflected in the above quote: acquiring valuable information, taking advantage of such knowledge, and gaining an unfair advantage.

80. *McClure*, 308 N.C. at 406, 302 S.E.2d at 762.

81. This balancing test has been followed in a number of cases. See *supra* note 50 and accompanying text.

82. See *Public Serv. Co. v. City of Shelby*, 252 N.C. 816, 821, 115 S.E.2d 12, 16 (1960).

83. See, e.g., *McClure*, 308 N.C. at 404-05, 302 S.E.2d at 761.

84. See *Huskins v. Yancey Hosp., Inc.*, 238 N.C. 232, 214 S.E.2d 49 (1975), cited in *McClure*, 308 N.C. at 405, 302 S.E.2d at 761.

85. *Huskins v. Yancey Hosp., Inc.*, 238 N.C. 357, 360-361, 78 S.E.2d 116, 120 (1953).

86. *Public Serv. Co. v. City of Shelby*, 252 N.C. 816, 822, 115 S.E.2d 12, 16 (1960); see, e.g., *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 214 S.E.2d 49 (1975).

87. *Boone v. Boone*, 217 N.C. 722, 728, 9 S.E.2d 383, 387 (1940); *Cobb v. Clegg*, 137 N.C. 153, 159, 49 S.E. 80, 83 (1904), quoted in *McClure*, 308 N.C. at 409, 302 S.E.2d at 764.

88. See *Cobb v. Clegg*, 137 N.C. 153, 159, 49 S.E. 80, 83 (1904).

89. See, e.g., *McClure*, 308 N.C. at 406-08, 302 S.E.2d at 762-63. The *McClure* court made a lengthy, complicated analysis of the facts in a strained attempt to prove that A.E.P.'s primary remedy was a permanent injunction. Once the court concluded that the primary relief sought by

Application of the second factor—whether the employer has an adequate legal remedy and, therefore, suffers no irreparable injury—is exemplified by the case of *Public Service Co. v. City of Shelby*.<sup>90</sup> After weighing the conveniences and inconveniences to both parties, the *Public Service* court refused to issue a preliminary injunction because the damages plaintiff would suffer could be remedied fully if plaintiff prevailed at trial.<sup>91</sup> Plaintiff's injury could not be considered irreparable because the potential damage to plaintiff was readily ascertainable lost profits.<sup>92</sup>

Examination of the balancing-of-conveniences approach exposes a problem endemic to the study of employment noncompetition covenants: courts borrow case law that was developed in nonemployment contexts<sup>93</sup> and apply it in employment noncompetition cases.<sup>94</sup> The *McClure* court relied on various types of preliminary injunction cases to support its holding.<sup>95</sup> Courts that have drawn distinctions between employment noncompetition covenants and sale-of-business noncompetition covenants generally have concluded that a stricter standard should be applied in employment noncompetition cases.<sup>96</sup> The *McClure* court, however, adopted a special *lenient* standard for these cases.

In *McClure* the North Carolina Supreme Court had several options available. First, since the eighteen-month restrictive covenant had lapsed by the

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A.E.P. was an injunction, it was free to hold that failure to grant A.E.P.'s motion would constitute irreparable harm. *Id.* at 410, 302 S.E.2d at 764.

90. 252 N.C. 816, 115 S.E.2d 12 (1960). The case did not involve a restrictive employment covenant—the city refused to allow the utility to expand its service into an area that the city intended to serve. The utility had an approved franchise to operate in the area in question and sought an injunction to stop the city from expanding its service into the area.

91. *Id.* at 821, 115 S.E.2d at 16.

92. *Id.* at 822, 115 S.E.2d at 16. See *Frink v. Stewart*, 94 N.C. 484, 486 (1886) (“[t]he Court will not grant relief by injunction . . . when it appears the plaintiff can have an adequate remedy, and compensation in damages for the injury sustained.”) (trespass case); see, e.g., *Faison v. McIlwaine*, 72 N.C. 312 (1873) (per curiam).

93. Motions for preliminary injunctions are raised in a wide variety of fact situations. See, e.g., *Ridge Community Investors v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977) (motion to enjoin defendant from creating cloud on title to land); *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975) (motion to enjoin defendant from obstructing roadway); *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 214 S.E.2d 49 (1975) (motion to protect exclusive advertising rights to telephone-book covers); *Western Conference of Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962) (motion to enjoin defendant from holding himself out as minister of conference); *Huskins v. Yancey Hosp., Inc.*, 238 N.C. 357, 78 S.E.2d 116 (1953) (motion to enjoin defendant from using driveway on plaintiff's property); *Boone v. Boone*, 217 N.C. 722, 9 S.E.2d 383 (1940) (motion to enforce contract stipulating defendant-husband would not file alienation of affection suit against plaintiff's boyfriend). See also *supra* note 4.

94. See, e.g., *Scott v. Gillis*, 197 N.C. 223, 226-27, 148 S.E. 315, 316-17 (1929) (holding relied on series of vendor-vendee covenant cases).

95. In addition to employment noncompetition cases, the court relied on: *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977) (materialmen's lien); *Huskins v. Yancey Hosp., Inc.*, 238 N.C. 357, 78 S.E.2d 116 (1953) (land infringement); *Cobb v. Clegg*, 137 N.C. 153, 49 S.E. 80 (1904) (covenant restraining use of office room).

96. See *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 75, 185 S.E.2d 278, 280 (1971) (quoting *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247 (1963)) (“‘However, since in the case of such [an employment] covenant the element of goodwill, or its transfer, is not involved and since there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, the courts have generally displayed a much stricter attitude to covenants of this type.’”), *cert. denied*, 280 N.C. 305, 186 S.E.2d 278, 280 (1971).

time the supreme court decided *McClure*, the court could have avoided the issue by holding that the issue was moot.<sup>97</sup> Numerous similar North Carolina cases have taken that approach.<sup>98</sup>

Second, the court could have held for A.E.P., relying on an application of the rule set forth in *Amdar, Inc. v. Satterwhite*.<sup>99</sup> The *Amdar* court concluded that the loss of even one customer to the employee's new employer was a sufficient showing of irreparable harm for a preliminary injunction to issue.<sup>100</sup> McClure admitted calling on A.E.P.'s customers,<sup>101</sup> maintaining that they were customers that he had developed prior to his A.E.P. employment.<sup>102</sup> If McClure made any sales to these customers, the court could have reasoned that those sales constituted the loss of customers necessary for A.E.P. to meet the irreparable-injury test enumerated in *Amdar*.<sup>103</sup>

Third, the court could have held for McClure by relying on *Wilmar, Inc. v. Liles*.<sup>104</sup> In *Wilmar*, two employees, both salesmen, did not sign employment contracts containing restrictive covenants until some time after starting work.<sup>105</sup> The North Carolina Court of Appeals held that a preliminary injunction should not issue because the employees had acquired information prior to the signing of the restrictive covenant, and "plaintiff was merely attempting to close the barn door after the horse was out."<sup>106</sup> The supreme court could have accepted the trial court's determination that McClure did not sign his employment agreement containing the noncompetition covenant until "six to eight months" after he started working for A.E.P.,<sup>107</sup> and thereby re-

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97. *McClure*, 308 N.C. at 411-12, 302 S.E.2d at 765 (Martin, J., dissenting).

98. See *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969); *Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E.2d 702, 703 (1954); *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 478-79, 241 S.E.2d 700, 702 (1978).

99. 37 N.C. App. 410, 246 S.E.2d 165, *disc. rev. denied*, 295 N.C. 645, 248 S.E.2d 249 (1978). In *Amdar* an employee for Arthur Murray Dance Studios quit and began working for a rival dance studio. At least two of the employee's pupils stopped using the Arthur Murray studio and instead took lessons from the employee at his new employer's studio.

100. *Id.* at 416, 246 S.E.2d at 168. The court also noted that defendant had "acknowledged" in his employment contract that breach of the noncompetition covenant would result in irreparable damage. *Id.* There was a similar clause in McClure's employment contract. The clause specified that breach of the noncompetition agreement could not be remedied at law, and that A.E.P., therefore, would be entitled to injunctive relief. *McClure*, 308 N.C. at 396, 302 S.E.2d at 756-57.

101. Record at 44.

102. *Id.* McClure did admit that he called on two companies that he had not known of prior to his A.E.P. employment. *Id.* Uncontradicted evidence presented to the trial court, however, demonstrated that McClure informed all the customers that he contacted that he was no longer employed by A.E.P. *McClure*, 308 N.C. at 416, 302 S.E.2d at 768 (Martin, J., dissenting).

103. To reach this holding, the court would have had to reason that McClure was barred from contacting any of A.E.P.'s customers, including those that he had dealt with prior to his joining A.E.P. The company, however, produced no evidence that it had suffered the loss of either specific customers or sales volume. Record at 1-7, 15-17; see *McClure*, 308 N.C. at 416, 302 S.E.2d at 768 (Martin, J., dissenting).

104. 13 N.C. App. 71, 185 S.E.2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972).

105. *Id.* at 72, 185 S.E.2d at 282.

106. *Id.* at 79, 185 S.E.2d at 283.

107. Record at 51; see *supra* note 19 and accompanying text. McClure stated that 14 or 15 months elapsed before he signed his first employment agreement. This was some six months after he was promoted to sales manager. Record at 36. A.E.P., however, contended that McClure signed the agreement as a condition of employment when he was hired. *Id.* at 2.

fused A.E.P.'s tardy efforts to close its barn doors.

Finally, the court could have adopted either of the two general tests that courts had applied previously—the balancing-of-conveniences test<sup>108</sup> or the special-knowledge test.<sup>109</sup> Proper application of either test would have resulted in a denial of A.E.P.'s motion for a preliminary injunction. According to the affidavits of McClure and others in the polyethylene industry,<sup>110</sup> McClure received no special knowledge while working for A.E.P. Application of a true balancing test also would have resulted in a denial of A.E.P.'s motion for a preliminary injunction because, as Justice Martin's dissent pointed out, issuance of the injunction would be devastating for McClure, while nonissuance merely would result in money damages for A.E.P.<sup>111</sup>

The *McClure* court, however, ignored all of these options and adopted one prong of the traditional test<sup>112</sup>—that the injunction should issue if it was necessary to protect the employer's rights during the course of litigation—and added a presumption of employer injury. The court feared that denial of injunctive relief would deny the employer an adequate remedy.<sup>113</sup> In essence, the *McClure* test weighs only the potential harm to the employer.

To reach this result, *McClure* followed a two-step analysis. First, the court stated that the right it sought to protect was the employer's right to injunctive relief.<sup>114</sup> To justify this conclusion, the court found that the injunction was the primary relief sought;<sup>115</sup> if the injunction were not the primary relief sought, issuing the injunction would have placed too harsh a burden on the employee. Thus, the *McClure* court acknowledged the balancing test by recognizing the propriety of granting injunctive relief only when that is the employer's primary remedy. The court, however, did not apply both prongs of the test. In a related second step, the court determined that injunctive relief was the primary remedy sought even though A.E.P. maintained a substantial damage claim in conjunction with its request for injunctive relief.<sup>116</sup> This second step is a repudiation of the traditional view that damages are not irreparable if they are compensable monetarily.<sup>117</sup>

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108. See, e.g., *Huskins v. Yancey Hosp.*, 238 N.C. 357, 360-61, 78 S.E.2d 116, 120 (1953).

109. See, e.g., *Diamond Match Div. of Diamond Int'l Corp. v. Bernstein*, 196 Neb. 452, 243 N.W.2d 764 (1976).

110. See *supra* note 76; see, e.g., *Diamond Match*, 196 Neb. at 456, 243 N.W.2d at 766-67 (court used special knowledge test and refused to issue preliminary injunction on facts similar to *McClure*).

111. *McClure*, 308 N.C. at 418-19, 302 S.E.2d at 769 (Martin, J., dissenting).

112. See *supra* notes 4-6 and accompanying text.

113. *McClure*, 308 N.C. at 406, 302 S.E.2d at 762 ("[T]he focus in cases such as [*McClure*] is . . . whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law."). The court's ultimate four-part test reveals a presumption in favor of the employer and does not even allude to potential injury to the plaintiff. See *id.* at 410, 302 S.E.2d at 764; *supra* text accompanying note 42.

114. See *McClure*, 308 N.C. at 406, 302 S.E.2d at 762.

115. *Id.* at 408, 302 S.E.2d at 763. See *supra* notes 87-89 and accompanying text.

116. See *id.* at 417, 302 S.E.2d at 768-69 (Martin, J., dissenting) (A.E.P. sought monetary damages in excess of \$1,000,000.).

117. See *id.* at 417, 302 S.E.2d at 768 (Martin, J., dissenting) ("Where money can compensate for the injury, it is not irreparable.").

It is clear that the court intended to establish a new standard for issuance of preliminary injunctions in employment noncompetition cases<sup>118</sup>—a standard that would serve the dual functions of giving North Carolina courts a clear rule to apply while discouraging interlocutory appeals.<sup>119</sup> The court, therefore, adopted a test which presumes that a preliminary injunction should issue for the “protection of plaintiff’s rights during the course of litigation”<sup>120</sup> so long as the covenant not to compete is valid.<sup>121</sup> Because the court’s rule assumes an automatic injury to the employer’s rights regardless of the other relief sought, the court’s reasoning establishes a rule which demands that the trial court issue a preliminary injunction. The *McClure* approach ignores the fundamental question in such cases—whether the employer has proved that a preliminary injunction is necessary to protect it from unfair competition by a former employee.<sup>122</sup>

The purpose of an employment noncompetition covenant is to prevent the employee from competing with his former employer. A look at a typical restrictive covenant, however, demonstrates that such protection actually is predicated on the employer’s concern that the employee will compete against his former employer using specialized information he gained while working for that employer.<sup>123</sup> The covenants signed by McClure are typical; they reflect A.E.P.’s fear that it not train or educate a future competitor. McClure’s initial noncompetition agreement provided: “*As a consequence of the confidential nature of the customer and prospect lists, and other product, prices, sales and financial information which has been and will be made available to me in my employment, I will not . . . thereafter [compete with A.E.P. Industries].*”<sup>124</sup> The purpose of McClure’s subsequent Agreement of Termination also was clear: “Employee, Bruce McClure, agrees that he will not at any time hereafter use or disclose any proprietary information of AEP *which has been acquired by him directly and solely as a result of his previous employment by AEP.*”<sup>125</sup> These agreements demonstrate that the right which the noncompetition covenants were intended to protect was A.E.P.’s right to be free from un-

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118. *Id.* at 401, 302 S.E.2d at 759. (“[B]ecause this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.”) For the dissent’s opinion on this issue, see *supra* note 44 and accompanying text.

119. See, e.g., *McClure*, 308 N.C. at 401, 302 S.E.2d at 759 (“[T]he appellate process is not the procedural mechanism best suited for resolving this dispute.”). The court noted that the *McClure* case was “clothed with immediacy.” *Id.* at 405, 302 S.E.2d at 762.

120. *Id.* at 406, 302 S.E.2d at 762. The court did not mention the need to protect any employee rights.

121. See *id.* at 404, 302 S.E.2d at 761.

122. See, e.g., *Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944). The *Kadis* court held that the court could only protect unique information of the employer that the employee had gained in confidence. See *supra* notes 67-72 and accompanying text.

123. See *Scott v. Gillis*, 197 N.C. 223, 227, 148 S.E.2d 315, 317 (1929) (“[S]uch agreements enable an employer to instruct his assistant without fear of afterwards having a rival.”).

124. *McClure*, 308 N.C. at 395, 302 S.E.2d at 756 (emphasis added). McClure’s second employment agreement was substantially the same as this first agreement. *Id.* at 396, 302 S.E.2d at 757.

125. *Id.* at 397, 302 S.E.2d at 757 (emphasis added).

fair competition, that is, competition resulting from knowledge or skills gained at A.E.P.'s expense.<sup>126</sup>

Of the three approaches the courts have adopted in deciding whether to grant preliminary injunctions—the special-knowledge test, the balancing-of-conveniences-and-inconveniences test, and the *McClure* analysis—the special-knowledge test<sup>127</sup> best effectuates the employer's purpose for demanding such covenants. That test should have been adopted by the supreme court because it protects the rights of both the employer and the employee.

Emphasizing the special knowledge gained by the employee avoids two problems common to both the *McClure* and the balancing-of-conveniences approaches: deciding whether the primary relief sought by the plaintiff is a permanent injunction<sup>128</sup> and deciding whether the injury suffered by the plaintiff would be irreparable should a preliminary injunction not issue. Furthermore, adopting the special-knowledge rule<sup>129</sup> would create a single flexible rule that is adaptable to all employment noncompetition situations.<sup>130</sup> Because a court may include knowledge of business procedures as special knowledge, it need not find any special technical skills to justify the issuance of an injunction. Thus, the special-knowledge rule allows the court to protect both the employer and the employee.

Adoption of the rule also would create a separate rule for preliminary injunctions in employment noncompetition cases.<sup>131</sup> An issue not resolved explicitly by the courts is whether these cases require a special rule because of their unique characteristics.<sup>132</sup> The *McClure* case demonstrates how difficult it

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126. See *Diamond Match Div. of Diamond Int'l Corp. v. Bernstein*, 196 Neb. 452, 243 N.W.2d 764 (1976).

127. See *id.*

128. Even under the special knowledge test, the court could weigh this factor if the issue was close and the only relief sought was a permanent injunction. In such a situation, however, the emphasis still should be whether the employer could make a reasonable claim that the employee had gained special knowledge or skills.

129. See *supra* notes 74-76.

130. Admittedly, application of the special-knowledge rule is subject to more than one interpretation. For example, under the facts in *McClure*, a court could hold for either side depending on whose affidavits one chose to believe. Such factual considerations, however, are subject to proof by expert witnesses.

131. No need exists to alter the traditional two-prong test in other preliminary injunction situations since such cases do not involve a policy issue as pressing as a person's right to earn a living. See, e.g., *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 74-75, 185 S.E.2d 278, 280 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972).

132. The court in *McClure* obliquely raised the issue when it stated that the case had two unique characteristics. *McClure*, 308 N.C. at 405-06, 302 S.E.2d at 762. The *McClure* decision appears to be a conscious decision by the supreme court to create a new rule for employment noncompetition cases because it felt the old rules were not effective.

Courts that have directly raised the issue commonly have applied the traditional preliminary injunction rule. Some courts, however, have recognized that different factors are at work:

"However, since in the case of such [an employment] covenant the element of goodwill, or its transfer, is not involved and since there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, the courts generally display a much stricter attitude with respect to covenants of this type."

*Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 75, 185 S.E.2d 278, 281 (1971) (quoting *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247 (1963)), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972). See also *Kadis v. Britt*, 234 N.C. 154, 29 S.E.2d 534 (1944).



can be for the court to find that the preliminary relief sought is an injunction when the plaintiff also seeks substantial monetary relief.<sup>133</sup> Adoption of the special-knowledge test would eliminate the need for such a finding because a court applying the test would need only to examine the types of employment and knowledge involved before reaching a decision. The irreparable damage issue<sup>134</sup> would be resolved implicitly by determining whether the employee had gained special knowledge that he could not fairly be allowed to use in competition with his former employer.<sup>135</sup>

Although the special-knowledge rule is imperfect—it requires a factual inquiry that mirrors a trial on the merits—it remains preferable to the balancing-of-conveniences approach and the *McClure* approach. The special-knowledge rule is designed to protect the employer's right to be free from *unfair* competition—the only right the employer legitimately can expect the courts to protect. Rather than burdening the trial courts with the difficult factual determination concerning the primary relief sought, such a test properly focuses on the justification for employment noncompetition covenant protection.

The best solution in employment noncompetition cases, however, is a change in the process for adjudicating such cases. The problem is that the preliminary injunction decision is in effect, although not in theory, a final determination on the merits insofar as injunctive relief is concerned.<sup>136</sup> This problem caused the *McClure* court to fashion a new, more lenient test that avoids an inquiry into the merits of the case by mandating that the preliminary injunction should issue in virtually all employment noncompetition cases.<sup>137</sup> The *McClure* court sought to remedy what it perceived as the crucial problem in employment noncompetition cases—uncertainty concerning how to apply the preliminary injunction standard—by creating a brightline test. Although the *McClure* standard does eliminate much of the trial court's difficulties, it does so at the expense of the employee's right to compete fairly with his former employer. Reforming the judicial procedure in such cases by creating an expedited determination of the injunctive merits of the case would protect both the employer's and the employee's rights while also protecting society's interest in reducing unnecessary restrictions on employment.<sup>138</sup>

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133. See, e.g., *McClure*, 308 N.C. at 417, 302 S.E.2d at 768-69 (Martin, J., dissenting) (illogical to hold that party seeking \$1,000,000 in damages is denied adequate relief when preliminary injunction is denied).

134. The difficulty in ascertaining whether damage is irreparable is demonstrated in *McClure*. Although the majority stressed that irreparable injury is defined in terms of an injury to which plaintiff should not have to submit, *id.* at 407, 302 S.E.2d at 763, both the dissent and the trial court defined irreparable injury in terms of whether the plaintiff could prove any monetary losses. *Id.* at 414-16, 302 S.E.2d at 766-68 (Martin, J., dissenting).

135. See *Diamond Match*, 196 Neb. at 456, 243 N.W.2d at 766-67. The special-knowledge test can be defined in terms of irreparable injury by stipulating that competition fostered by special knowledge is the definition of irreparable harm; should a plaintiff demonstrate such harm the court then would issue a preliminary injunction to protect the plaintiff from irreparable injury.

136. See *supra* notes 10-13 and accompanying text.

137. See, e.g., *McClure*, 308 N.C. at 406, 302 S.E.2d at 762; see *supra* notes 8, 35-42 and accompanying text.

138. See *Kadis v. Britt*, 224 N.C. 154, 158-59, 29 S.E.2d 543, 546 (1944). The court in *Kadis*

Summary eviction statutes provide the best models for such an expedited procedure. In a North Carolina summary eviction action,<sup>139</sup> the plaintiff files a complaint to force the defendant out of possession. The clerk of the superior court then issues a summons requiring the defendant in possession to appear to answer the complaint at a date not more than ten days after the summons issues.<sup>140</sup> At the hearing a magistrate tries the issue of tenancy;<sup>141</sup> on appeal to the district court "either party may demand that the case be tried at the first session of the court after the appeal is docketed."<sup>142</sup> Such statutes commonly provide that trial and eviction can be obtained within a few days.<sup>143</sup>

When an employer seeks a preliminary injunction to enforce a former employee's covenant not to compete, a similarly expeditious process could be utilized to adjudicate the injunctive merits of the case while preserving the rights of the parties to institute separate suits litigating damages or other relief. For example, in *Lindsey v. Normet*<sup>144</sup> the Supreme Court held that parsing out one, limited, equitable issue for summary adjudication was constitutional<sup>145</sup> in a summary eviction setting.

An expedited process for an employment noncompetition covenant preliminary injunction, however, should provide for a trial to the court rather than to a magistrate.<sup>146</sup> This would lend additional authority to the decision and would ensure protection of each party's due process rights.<sup>147</sup> Furthermore, the court should use the special-knowledge test<sup>148</sup> to decide if the employer had a property right that needed protection.

As an additional step to expedite the judicial process, the losing party should be allowed to appeal the trial court's decision to the court of appeals through an expedited discretionary review procedure—in effect a modified writ

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emphasized that not only does broad public policy demand no restraints on trade, but such restraints are both inefficient and expensive to society. *Id.* at 160, 29 S.E.2d at 547.

139. N.C. GEN. STAT. §§ 42-26 to -36.1 (1976 and Cum. Supp. 1983).

140. *Id.* § 42-28 (Cum. Supp. 1983).

141. *Id.* § 42-31 (1976).

142. *Id.* § 42-34 (Cum. Supp. 1983). Despite serious challenges, the United States Supreme Court has upheld the constitutionality of a summary eviction statute similar to the North Carolina provision. See *Lindsey v. Normet*, 405 U.S. 56 (1972). In *Lindsey* the Court held that the Oregon Forcible Entry and Wrongful Detainer Statute was constitutional. *Id.* at 64, 69. The Oregon statute required a trial no later than six days after service of the complaint and limited the issue at trial to whether the tenant had paid his rent or held over. Thus, the statute excluded any tenant defenses based on the landlord's breach of duty. *Id.* at 59 n.3, 63-64. The Court noted that the tenant or landlord still could bring a separate suit seeking damages or other relief. *Id.* at 66. Such reasoning also applies to employment noncompetition cases.

143. D. DOBBS, REMEDIES 370 (1973). Although North Carolina provides that the hearing before the magistrate must take place not more than 10 days after issuance of the summons, N.C. GEN. STAT. § 42-28 (Cum. Supp. 1983), the tenant has a 10-day automatic stay of execution of the judgment. N.C. R. Civ. P. 62(a). The North Carolina courts have held that the tenant's rights are protected adequately by N.C. GEN. STAT. §§ 42-35 and -36, which provide a remedy to the tenant if he is first evicted and later restored to possession. See *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

144. 405 U.S. 56 (1972).

145. *Id.* at 67.

146. See N.C. GEN. STAT. § 42-31 (1976).

147. See U.S. CONST. amend. XIV, § 1.

148. See *supra* notes 73-78 and accompanying text.

of supersedeas.<sup>149</sup> The respondent should be allowed only a short time in which to file a response<sup>150</sup>—no more than eight days after the appeal is filed. The court of appeals should place the case at the top of its docket and should reverse the trial court's determination only on a clear showing of abuse of discretion. It need hear no oral arguments; the briefs and trial record would constitute a sufficient basis on which to determine whether the lower court abused its discretion.<sup>151</sup> Further discretionary review by the supreme court should be provided through the same expedited procedure.

There is no persuasive argument opposing such a special procedure for employment noncompetition cases. As the judicial process now functions, once a temporary restraining order is issued, a hearing must be held within ten days, at which time the parties must show cause why the restraining order should or should not continue.<sup>152</sup> In practice, however, this "show cause" hearing is a final determination on the merits.<sup>153</sup> The expedited procedure proposed by this Note merely formalizes the final nature of this immediate hearing, and provides a procedural means through which the rights of the employer and employee are protected from such an incomplete, ad hoc adjudicatory process. Currently, the attorney facing a "show cause" hearing must prepare his case as if he were trying the final hearing on the matter. The proposed process would stabilize the standards applied, the decisions reached, and the appellate process followed. The accelerated appellate procedure would not impose an undue burden on either party because both sides already would have prepared for the summary hearing on injunctive relief. Having had to prepare for the summary determination, both sides also would be able to formulate and present their arguments on appeal within a short time after the hearing.<sup>154</sup>

The North Carolina Supreme Court correctly recognized that a motion for a preliminary injunction in employment noncompetition cases raises unique problems of immediacy that require special judicial treatment. The rule promulgated in *McClure*, however, resolves these problems in favor of the

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149. See N.C. R. App. P. 23. An appellant should be required to file such an appeal within three days after the trial court's decision to avoid extending the appellate process and emasculating the purpose of an expedited procedure.

150. See *id.* at 23(d) (10 days in supersedeas).

151. *Id.* This rule provides that no briefs are to be filed in support of a writ of supersedeas. The proposed appellate process would allow briefs.

152. N.C. R. Civ. P. 65(b). This 10-day limit is subject to extension. In *McClure* the temporary restraining order was granted October 22, 1981, was continued by consent of both parties until November 17, 1981, and again was continued by Judge Snapp until he finally ruled on A.E.P.'s motion for a preliminary injunction on November 30, 1981. *McClure*, 308 N.C. at 399-400, 302 S.E.2d at 758-59. Because time is of the essence in employment noncompetition cases, see *id.* at 405, 302 S.E.2d at 762, either party should be allowed to continue the hearing on the temporary restraining order only one time, and for no more than 10 days. Thus, judgment on the injunctive merits would have to occur no more than 20 days after the order was issued.

153. See *supra* notes 10-13 and accompanying text.

154. The complaint most likely to result from this proposed summary procedure may come from the appellate judges who would be forced to alter their calendar and hand down a decision in a short time period. Complaints of crowded court calendars, judicial efficiency, and inadequate preparation time for the bench may surface. These arguments pale in comparison to the strong public policy in favor of freedom of employment and against restraint of trade.

employer without considering the employee's right to obtain employment in the area in which he is best qualified. The rights and needs of employer, employee, and society are protected more equitably by the "special knowledge" test. To ensure adequate protection of all parties, the General Assembly should enact the proposed summary injunctive hearing and the expedited appellate procedure.<sup>155</sup> These procedural amendments would ensure that the hearing for injunctive relief and the appellate process that follows do not continue to be a winner-take-all gamble—North Carolina's version of injunctive Russian Roulette.

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155. The summary injunctive hearing and expedited appellate procedure for employment noncompetition cases that this Note proposes would require, at most, seven steps to complete:

(1) If the employer obtains a temporary restraining order, or files a motion for a preliminary injunction without first obtaining a temporary restraining order, a summary hearing solely on the question of injunctive relief would be held 10 days after the temporary restraining order was entered or the motion filed. This date could be expanded a maximum of one time for a maximum of 10 days. The summary determination would be issued by a judge.

(2) If the losing party chose to appeal, he would be required to file a petition for expedited review to the court of appeals within three days of judgment and the appellant also would be required to file his brief in support of his petition within eight days of the judgment date.

(3) The appellee would have eight days from the notice of appeal to file his brief in response to the petition for review.

(4) The court of appeals would reverse only upon a showing of abuse of discretion, and no oral arguments would be allowed.

(5) The same three- and eight-day time limits would apply for a petition for discretionary review of the court of appeals' decision to the North Carolina Supreme Court.

(6) The same eight-day time limit for the filing of briefs in response would apply to the supreme court.

(7) The supreme court also would apply an abuse of discretion standard on review, and would hear no oral argument on the case.

The General Assembly should stipulate that appeals from the summary injunctive hearing receive first priority consideration ahead of other cases on the docket. To facilitate the purpose of the expedited procedure, the court of appeals and supreme court should be prepared to hand down their decisions in a shortened time frame—preferably within two weeks of receipt of both sides' briefs. A majority of cases could be affirmed without opinion, given the heavy burden of proving abuse of discretion, which also would speed the courts' determination. At most, no more than 90 days should elapse from the setting of a summary hearing date to final appellate adjudication.